FILED
SEP 9 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

R. G. DICKINSON & CO.,)
Appellant,) Filed September 9, 1977
vs.)
FRED KNOSBY,) 74
Appellee.) 2-57967

Appeal from Warren District Court - Robert O. Frederick, Judge.

Plaintiff appeals jury verdict claiming error in instructions and failure to follow instructions in determining damages arising from numerous commodity market transactions. - Affirmed.

Bruce I. Campbell, of Thoma, Schoenthal, Davis, Hockenberg & Wine, of Des Moines, for Appellant.

Richard G. Langdon & Curt L. Sytsma, of Herrick, Langdon, Belin, Harris, Langdon & Helmick, of Des Moines, for Appellee.

Heard by Allbee, C.J., and Snell, Oxberger and Carter, JJ; Donielson, J. takes no part.

PER CURIAM

Plaintiff, R. G. Dickinson & Co., brought suit against defendant, Fred Knosby, for damages arising out of an unpaid commodity account balance in the amount of $37,311.25. Defendant counterclaimed, alleging five separate transactions in which plaintiff either negligently or without authorization executed transactions on behalf of defendant which caused losses in the amount of $77,475. The jury returned a verdict for $28,500 on plaintiff's initial cause of action and for $33,925 on defendant's counterclaim. Plaintiff's motion for new trial was overruled. From the adverse verdict, plaintiff appeals.

On appeal, plaintiff alleges that: 1) the evidence is not supportive of the verdict, that there was error in fixing the amount of recovery and that the jury did not follow the instruction and is therefore contrary to law; and 2) the instructions given were erroneous and/or confusing and misleading. We consider the alleged errors in reverse order.

I. **Instructions.** It is the trial court's duty to see that the jury has a clear and intelligent understanding of what it is to decide. Robeson v. Dilts, 170 N.W.2d 408, 414 (Iowa 1969); Gibbs v. Wilmeth, 261 Iowa 1015, 1022, 157 N.W. 93 (1968). It is also the trial court's duty to instruct with reasonable fullness on the pleaded issues which have evidentiary support. Hartwig v. Olson, 261 Iowa 1265, 1278, 158 N.W.2d 81 (1968); **Gibbs**, supra. However, the giving of instructions which are conflicting and confusing is reversible error. **Hartwig**, supra, and cases cited therein. Plaintiff claims the instructions given were erroneous and if not, they were at least confusing and misleading so as to compel the trial court to grant a new trial.

After a review of the entire record and a study of all of the instructions, we do not find the instructions to be erroneous; nor do we find them to be confusing or misleading.

Appellant argues that Instruction No. 17 was confusing because of the five counterclaims in the Statement of Issues, only two of which could properly be used as offsets against plaintiff's claim.

In the instruction the court stated (X. 123):

> "In connection with the damages claimed by the defendant on his counterclaim, you are instructed that the items claimed as set out in paragraphs 4 and 5 in the Statement of Issues and Instructions shown on page 2 of these instructions the defendant has offered evidence of damages relating to these two items based on the status of the claimed account of the plaintiff as of its closing which showed a claimed deficit of $37,311.25. You are instructed that the jury should take into account the fact that the plaintiff's disputed account has not been paid by the defendant in determining your damages with respect to these two items and the jury should eliminate any duplication or overlapping of the claimed charges in arriving at their verdict."

Although the reference to paragraphs 4 and 5 was incorrect we find the thrust of the instruction properly cautioned the jury to avoid overlapping or duplication of claims by defendant where the plaintiff's account had not been paid. There is no evidence that the jury failed to follow this instruction. No evidence appears that any claim of defendant was allowed as an offset against plaintiff's claim and as a recovery in defendant's counterclaim. "We cannot assume that jurors would fail to understand or follow the clear import of the instruction." Bruno v. United States, 308 U.S. 287, 294, 60 S. Ct. 198, 200, 84 L. Ed. 257 (1937).

II. **The Verdict.** Plaintiff's other contention is that the verdict is not supported by the evidence, therefore, there was error in fixing the amount of recovery and/or the jury did not follow the instructions.

In ruling upon motions for new trial, the trial court has broad but not unlimited discretion in determining whether the verdict effects substantial justice between the parties. Rule 14(f)(13), Rules of Appellate Procedure. Only upon a clear showing of an abuse of such discretion will an order granting or refusing a new trial be set aside. Vojak v. Jensen, 161 N.W.2d 100, 105-06 (Iowa 1968).

The burden is upon the plaintiff to prove all material elements of an open account sued upon by a preponderance of the evidence. National Food Products Corp. v. Schakel, 171 N.W.2d 858, 859 (Iowa 1969). But a plaintiff is not required to show the amount of damages sustained with the same degree of certainty required for a showing of the fact they were sustained. Conley v. Warne, 236 N.W.2d 682, 687 (Iowa 1975).

The assessment of damages is traditionally a jury function and its decision

should be disturbed only for the most compelling reasons. Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975). As long as the verdict is within a reasonable range as indicated by the evidence, a reviewing court will not interfere with what is primarily a jury question. **Olsen,** supra; Stauter v. Walnut Grove Products, 188 N.W.2d 305, 313 (Iowa 1971).

Plaintiff argues that its principle claim and defendant's counterclaims are in essence, claims for sums certain. If defendant is to recover on any of his counterclaims, it is an all or nothing proposition depending upon who the jury believes. Defendant, on the other hand, argues that because of the nature of the commodity market in general, the uncertainties, the numerous irregularities and the hectic trading days during the period of time leading up to the lawsuit, the damages are necessarily uncertain.

Plaintiff's initial claim of $37,311.25 represents the claimed unpaid balance on Knosby's commodity account. This amount represents the final dollar balance over the entire history of the account. But, there was testimony that certain trades were never requested by Knosby. A jury could properly reduce plaintiff's claim by the amount of commissions charged, if they found the trades to be unauthorized.

Secondly, not all of defendant's counterclaims are liquid. Knosby's second claim, for 10 May Corn, is entirely speculative. If the jury in fact believed plaintiff failed to order all the May Corn requested, it still had the problem of deciding at what price, which was only an approximation.

There is a similar problem with the two claims for negligence regarding the November Beans. Knosby claims there was an unauthorized sale of 10,000 bushels of November beans. For damages he seeks to use the maximum price of $6.42 per bushel. Knosby also claims plaintiff negligently delayed purchasing 30,000 bushels of November beans to cover his short position. His counterclaim seeks maximum damages based upon a purchase price of $6.41 compared to a price of $5.36 which he claims should have been utilized. Clearly, it was for the jury to determine whether these maximum damages or some lesser sum were proved.

Finally, Knosby sought damages for negligently giving him the wrong market price on May Beans, causing him to sell his beans for less than if he had continued

to hold them. Even if the jury found in favor of Knosby on this claim, there is still a factual question whether Knosby would have held these beans as long as he alleges and what his actual damages were. In Hallett Constr. Co. v. Iowa State Highway Comm., 258 Iowa 520, 139 N.W.2d 421 (1966) the court considered the concept of "sum certain," stating:

> "Plaintiff also contends each claim is for a 'sum certain' because it asks a specific amount for each alleged item of damage and we are urged to adopt this as the meaning of the quoted term .... This we cannot do. To do so would permit almost any unliquidated claim at law to be transformed into one for a sum certain by merely placing a monetary amount on the item of damage for which claim is made even though such amount has not been fixed, settled, or agreed upon by the parties and regardless of the nature of the claim." 258 Iowa at 52829, 139 N.W.2d at 427.

We do not feel the jury erred in fixing the amount of recovery or that it ignored the court's instructions. The verdict was within a reasonable range as indicated by the evidence. The trial court properly overruled plaintiff's motion for new trial. The judgment is affirmed.